Date Issued: January 6, 1998

Case Number: 95-CAA-10

In the Matter of:	
Harry L. Williams, *Complainant*,	
v.	
Lockheed Martin Energy Systems, Inc.; Martin Marietta Corporation; Martin Marietta Technologies, Inc. *Respondents*.	

RECOMMENDED DECISION AND ORDER

This proceeding was commenced by a complaint filed on August 2, 1994 under the employee protection provisions of six federal environmental protection statutes: the Clean Air Act ("CAA"), 42 U.S.C. § 7622; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601; the Solid Waste Disposal Act ("SWDA"), as amended by the Resource Recovery and Control Act ("RRCA"), 42 U.S.C. § 6971; the Comprehensive Environmental Response and Liability Act ("CERCLA"), 42 U.S.C. § 9610; (together referred to as "Environmental Acts") and the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. The proceeding is governed by the regulations promulgated under the above referenced statutes by the Secretary of Labor which are found at 29 C.F.R. Part 24.

Complainant, Harry L. Williams, contends that he was the subject of disparate treatment because he engaged in activity protected under the aforesaid statutes. The District Director of the Nashville, Tennessee regional office of the Employment Standards Administration, United States Department of Labor, found after an investigation that Complainant had not set forth a claim on which relief under the environmental protection statutes could be granted.

Complainant timely appealed the Employment Standard Administration's decision to the Office of Administrative Law Judges on March 8, 1995. A hearing was scheduled for September 25 - 29, 1995, but continued at the request of Complainant. Subsequently, the following Orders were issued disposing of pre-hearing motions filed by the parties:

(1) Union Carbide Corporation was dismissed as a Respondent by Order dated June 26, 1995 ;

(2) An Order dated July 19, 1995 granted in part and denied in part a motion for discovery and the production of documents;

(3) Complainant's request to order the United States Department of Energy to honor his FOIA request was denied by Order dated August 1, 1995;

(4) United States Department of Energy was dismissed as a Respondent by Order dated August 2, 1995;

(5) The Y-12 plant, the K-25 plant, Sam Thompson and Lorry Ruth were dismissed as Respondents by Order dated August 8, 1995. The same Order denied Respondent Lockheed Martin Energy System's motion to dismiss Complainant's complaint against Martin Marietta Corporation and Martin Marietta Technologies;

(6) An Order permitting in part and denying in part discovery and the exchange of exhibits and witness lists was issued on August 24, 1995;

(7) An Order providing for scheduling, sanctions and the confidentiality of medical records was issued on November 1, 1995.

(8) Orders concerning discovery were issued on March 4, 1996; July 10, 1996; September 25, 1996; and again on December 16, 1996.

Lockheed Martin Energy Systems, Inc. (formerly Martin Marietta Energy Systems); Martin Marietta Corporation; and Martin Marietta Technologies, Inc ("Respondents") filed a Motion for Summary Decision dated February 16, 1996 arguing that there are no genuine issues of material fact and that Respondents are entitled to judgment as a matter of law.

During the period February 1996 through September 1996, Complainant requested and was granted six extensions of time in which to reply to Respondents' Motion for Summary Decision. No response was filed. On September 30, 1997 the undersigned administrative law judge issued an Order allowing Complainant twenty-five additional days to respond. Although two requests by Complainant for additional time were denied, Complainant filed *inter alia* a "Partial Response To Summary Judgment," along with a request for additional time to file a more detailed statement. Complainant's partial response is considered; however, his request for additional time to file a more detailed statement is denied.

SUMMARY DECISION

The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d) (1996). This section, which is derived from Fed. R. Civ. P. 56, permits an Administrative Law Judge to recommend summary decision for either party where "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact." 29 C.F.R. §18.40(d).

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. *Gillilan v. TVA*, 91-ERA-31(Sec'y Aug. 28, 1995) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986), but the determination of whether a genuine issue of material fact exists

must be made viewing all the evidence and factual inferences in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Respondents argue, *inter alia*, that summary decision should be granted in whole or in part because most of the adverse actions set forth in Complainant's complaint are barred by the statute of limitations and those which are alleged to have occurred within the statutory period were not adverse to the Complainant or were not taken as a result of any purported protected activity.

Background

Respondents manage three United States government owned facilities in Oak Ridge, Tennessee. The three facilities are the K-25 Site, the Y-12 Plant and the Oak Ridge National Laboratory. Each facility occupies its own site several miles from the others.[1] These facilities had been managed by Union Carbide Corporation before April 1, 1984.[2] Complainant has worked at the Oak Ridge facilities in its security organization since 1976. He continues to be employed there. He began his career as an hourly guard. He subsequently became a lieutenant performing training duties. He was transferred from Training to Operations in 1983. With Operations, his duties involved the actual day to day protection of the K-25 Site. While with Operations, he was promoted to captain. Complainant was reassigned to Training in 1987 to strengthen the training program's capability to meet new requirements set by the Department of Energy (DOE). Complainant remained armed and available for assignment to Operations on an as-needed basis.

Complainant suffered a heart attack on February 12, 1989. The heart attack prevented Complainant from meeting the DOE's physical fitness requirements for the position of an armed officer.[3] As a result Complainant's job title was reclassified on December 1, 1989, as "procedures specialist." Employer offers that its personnel office changed Complainant's classification in order to keep him employed and that this classification "fit" the work already being performed. Complainant maintained the same pay grade and salary as he had as captain, and he continued to perform essentially the same training functions he had previously performed

[1] Affidavit of C. H. Peterson.

[2] *See* Order Granting Respondent Union Carbide Corporation's Motion to Dismiss, 95-CAA-10, June 26, 1995.

[3] Appendix to Respondents' brief at 1030-31 (10 C.F.R. 1046.11 and appendix A thereto at E(2)(b)); and appendix to Respondents' brief at 103484.

except that he was no longer available to be assigned to Operations because he was no longer qualified to carry a weapon.[4]

Effective January 1, 1992, complainant was promoted to a pay level 4 position titled Training Officer-Security, still in the K-25 Security Patrol.[5] In May 1992, he moved into different office space. Employer explains the relocation as motivated by a need to make larger office space available to an employee whose administrative responsibilities and staff were increased. Complainant was assigned a clerk, a subcontractor computer specialist, and training officers.[6] During 1992 and 1993, Complainant worked with the Central Training Facility and moved there in August 1993.[7]

In October 1993, Respondents underwent a comprehensive reorganization designed to centralize management of all plant protection activities.[8] Cliff Druitt, manager of Protective Services Training, made the decision to transfer Complainant to the newly centralized Department of Training Development because of Complainant's job experience.[9] In May 1994, at the request of his physician, he was detailed to a temporary, full time assignment in the Y-12 Nuclear Material Control and Accountability organization (NMC&A).[10] On August 2, 1994, Complainant filed the complaint which forms the basis of this action. His current position is as a training developer in the Development Group of the Protective Services Training and Development Department located at the Central Training Facility.

Statute Of Limitations

The above referenced Environmental Acts require that a complaint must be filed within thirty days of the alleged retaliation. The ERA provides that a complaint must be filed within one hundred eighty days of the alleged retaliation.[11] Complainant complains of four adverse actions that occurred within the limitations period. The other claims of retaliation are alleged to have

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[4] Affidavit of Sam A. Thompson, ¶ 11; Affidavit of Peter White ¶ 3.

[5] Appendix to Respondents' brief at 1403.

[6] Deposition of Complainant, September 5, 1995, pp. 553-556; Affidavit of Peter White, ¶ 5.

[7] Deposition of Complainant, *supra*, at 558, 620-21, 624.

[8] Affidavit of Peter White, ¶ 6.

[9] Affidavit of Clifford A. Druitt, ¶ 3.

[10] Affidavit of Willis Leon Clements, ¶ 7.

[11] CAA, 42 U.S.C. § 7622(a)(1); RCRA, 42 U.S.C. § 6971(b); TSCA 15 U.S.C. § 2622(b)(1) and CERCLA, 42 U.S.C. §9610 (b).

occurred prior to the limitations period, as far back as the early 1980s. A complaint that references an act of retaliation outside of the proscribed time period will be time barred unless the complainant can show that an equitable modification of the statute of limitations period is appropriate or that the retaliatory acts were part of a continuing violation.

Equitable Tolling

Complainant asserts at paragraph 71 of his complaint that he is "entitled to equitable tolling under the continuing violations doctrine." The doctrine of equitable tolling can be applied to modify the filing period under narrow circumstances. Complainant must show that: (1) the Respondents actively misled him with respect to the cause of action; (2) Complainant has in some extraordinary way been prevented from asserting his rights; or (3) Complainant has raised the precise statutory claim but has mistakenly done so in the wrong forum. *Bonanno v. Northeast Nuclear Energy* Co., 92-ERA-40 and 92-ERA-41 (Secretary August 25, 1993) citing *School Dist. Of City of Allentown* at 20 citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). Ignorance of the law, in the absence of employer misconduct, will not suffice to invoke the doctrine. *School Dist. Of City of Allentown v. Marshall*, 657 F.2d 16, 19 (1981).

Nothing in the record other than Complainant's bare assertion indicates that the doctrine of equitable tolling is applicable to the facts of this case. There is no allegation that the Respondents misled Complainant or otherwise prevented him from learning about his rights or pursuing available remedies under the statute. The complaint itself discloses that Complainant was suspicious of every action taken by Respondents throughout his career. Complainant complained in writing at least once and in some cases several times to different levels of Affirmative Action and EEO officials long before he filed the instant claim. Also, there are no allegations that Complainant timely raised these claims but did so in the wrong forum. Complainant asserts that the Department of Energy set up "phony" EEO offices to receive complaints and induce employees to wait past the statutes of limitations periods before filing a formal complaint.[12] However, there is no evidence in the record that Complainant mistakenly filed the claims relevant to this case before a phony EEO office. Nor in fact is there evidence to support a finding of the existence of phony EEO offices. Complainant did file grievances with an EEO office; however, such filings were not alleged to be filings in the wrong forum. *See Lewis v. McKenzie Tank Lines, Inc.*, 92-STA-20 (Sec'y Nov. 24, 1992); *Kelly v. Flav-O-Rich, Inc.*, 90-STA-14 (Sec'y May 22, 1991).

Complainant also contends at paragraph 70 of his complaint that equitable tolling is appropriate because he was unaware of his rights under the Acts until he obtained a lawyer. However, ignorance of the law, in the absence of employer misconduct, will not suffice to invoke the doctrine of equitable tolling. *School Dist. Of City of Allentown v. Marshall*, 657 F.2d 16, 19 (1981); *Hancock v. Nuclear Assurance Corporation*, 91-ERA-33 (Sec'y, Nov. 2, 1992) . The record does not support the use of the doctrine of equitable tolling to modify the mandatory

[12] August 2, 1994 complaint filed with U.S. Department of Labor, ¶ 70(c).

filing period under the Acts.

Continuing Violations

The separate and distinct doctrine of continuing violation can also be applied to toll the limitation period. Complainant must show (1) that there is a connection between the alleged, retaliatory acts and (2) that at least one of the retaliatory acts occurred within the statute of limitations period. *Bonanno v. Northeast Nuclear Energy* Co., 92-ERA-40 and 92-ERA-41 (Secretary August 25, 1993). The connection between the alleged, retaliatory acts must be more than just continuity of employment. *Delaware v. Ricks*, 449 U.S. 250, 257 (1980).

The initial question on the applicability of the continuing violation theory is whether one or more of the alleged adverse actions occurred within the limitations period. If the Complainant can show that one of the alleged adverse actions did occur within the specified time frame, then it must be determined whether the alleged adverse actions which fall outside of the limitations period are significantly related to the adverse action to support a finding of continuing violation.

Complainant filed the instant complaint on August 2, 1994. The only alleged adverse action which occurred within the thirty day limitation period under the Environmental Acts is Complainant's assertion that an employee of Respondents eavesdropped on a conversation between Complainant and Bud Varnadore, who is identified by Complainant as "the prevailing party in *Varnadore v. Oak Ridge National Laboratory & Martin Marietta Energy Systems, Inc.*"[13] Complainant asserts in his complaint that within two hours of his conversation with Bud Varnadore, "one of Respondents' Human Resources agents" telephoned Complainant to inquire whether he had any complaints. Complainant argues that the telephone call must have been a consequence of Respondents' eavesdropping in on his conversation because the chance of such a coincidence is "remote at best." Complainant reasons that only someone listening in on the conversation could have learned of it because no secretary had answered the phone and no message had been left by Mr. Varnadore. Complainant contents that the eavesdropping constitutes retaliatory action because of Respondents' perception that Complainant had engaged in protected activity in association with Mr. Varnadore. [14]

Respondents reply to this allegation by submitting an affidavit by Walter F. Ghosten. The affidavit identifies Ghosten as the person who made the telephone call in question and explains the purpose of the call. The affidavit proffers that: Ghosten was temporarily assigned to the Respondents' Office of Workplace Diversity at Y-12. On July 14, 1994, Ghosten telephoned Complainant at the request of his supervisor, Joyce Conner, who, on June 6, 1994, had received a form (part of the Employee Self-Identification Program for Veterans and Persons with Disabilities) in which Complainant alleged that no accommodations for his diabetes and cardiac

[13] Id., ¶ 22.

[14] Id., ¶¶ 22-27.

disease had been made. Conner left a handwritten note on June 29, 1994 requesting Ghosten to contact Complainant to discuss his comments. Ghosten remembers meeting with Complainant on July 14, 1994 in his office after Complainant returned his phone call. The affidavit proffers that no one except Conner asked Ghosten to telephone Complainant.[15]

Respondents state that Ghosten's affidavit constitutes uncontroverted evidence explaining the purpose of the July 14, 1994 telephone call from its "Human Resources agent." Complainant's unsubstantiated suspicion that the telephone call was a consequence of Respondents' eavesdropping on Complainant's conversation cannot withstand Respondents' Motion for Summary Decision. In reality, the facts suggest that Respondents were acknowledging Complainant's health concerns. It is determined that Complainant did not suffer from a retaliatory action as a result of any protected activity within the thirty day statute of limitations period under the Environmental Acts.

An additional three adverse actions are alleged to have occurred within the 180 day statute of limitations period of the ERA.[16] Initially, Complainant contends that he was retaliated against by being informed that he would lose his security clearance.

In May 1994 Complainant was notified that his Q clearance was to be reduced to an L clearance. Complainant alleges at paragraphs 11 through 16 of his complaint that the proposed security clearance reduction was a crude threat and a blatant act of intimidation and retaliation for protected activity. Complainant proclaims the threatened security reduction to be a part of Respondents' habitual misuse of security clearances in order to harass personnel and restrain them from engaging in protected activity. Complainant portrays the notice of reduction as being engineered by a group of former military personnel, including retired generals and colonels.[17]

An Affidavit by Lorry Ruth, Jr. states that Ruth was the Head of Training Development in August of 1994, and that he recommended in March of 1994 that Complainant's security clearance be changed from a Q clearance to an L clearance. The affidavit states that Ruth's recommendation was based on his knowledge of Complainant's lack of real need for a Q clearance in performing his work in Ruth's department and the fact that Ruth, along with all Protective Security Department heads, was being pushed "rather hard" to downgrade security clearances in accord with policy of the Department of Energy and in order to conserve resources.[18] The policy of the Department of Energy as set forth in a June 21, 1993 memo required that the Q clearance should be limited to persons who access Q level information or material on a frequent or recurring

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[15] Affidavit of Walter L. Ghosten, ¶¶ 2-6.

[16] 42 U.S.C. § 5851(b)(1).

[17] Complaint, *supra*, ¶¶ 11-14.

[18] Affidavit of Lorry Ruth, Jr., ¶ 7.

basis, and that those persons who need access to a protected area only several times per month or less should have their Q clearances reduced and be provided escort service.[19] Complainant testified during his deposition that while working for Ruth he only occasionally went to places that required a Q clearance.[20]

Ruth admits in his affidavit that his recommendation for a reduced security clearance failed to consider the fact that Complainant required a Q clearance to perform the temporary work to which he was assigned at NMC&A because none of that work was under Ruth's direction.[21] The NMC&A work performed by Complainant was not under the direction of Ruth, and he had no responsibility for it other than to permit Complainant to spend two days a week there.[22] Complainant brought the proposed reduction of his security clearance to the attention of Leon Clements, Director of Energy Systems Protective Services Organization. Complainant informed Clements in a letter dated May 26, 1994 that he could not continue to work at NMC&A without a Q clearance.[23] An affidavit provided by Clements states that Clements responded to Complainant's May 26, 1994 letter by orally ordering the impending clearance reduction to be placed on a temporary hold, and by following up with a memorandum canceling any action to reduce Complainant's Q clearance because of his assignment to NMC&A.[24] Complainant continues to hold a Q clearance.[25]

Complainant never had his security clearance reduced and it is doubtful that a mere notification of pending clearance reduction constitutes a retaliatory action in violation of the ERA. Moreover, Respondents' explanation, through the affidavits of Ruth and Clements, that the notification of reduction of security clearance resulted from the DOE directive and an attempt to conserve resources by limiting clearances that are costly to maintain is accepted as uncontradicted. Complainant's charge that Respondents regularly threatened employees with reduced security clearance in order to intimidate them into not engaging in any protected activity is unsubstantiated. The notification of security clearance was not an adverse action under the ERA.

Complainant also alleges that Respondents retaliated against him by failing to associate a

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[19] Appendix to Respondents' brief at 22029-30.

[20] Deposition of Complainant, *supra*, p. 694-696.

[21] Affidavit of Lorry Ruth, Jr. ¶ 7.

[22] Id.

[23] Appendix to Respondents' brief, pp. 27, 28.

[24] Affidavit of Willis Leon Clements,. ¶ 8.

[25] Id.

letter from his personal physician dated April 28, 1994 with his medical file. The letter was provided to Clements by Complainant. The letter asserted that Complainant was suffering from stress as a result of a conflict ridden relationship between Complainant and Ruth and recommended that Complainant be removed from Ruth's supervision.[26] Clements responded to the physician's recommendation by arranging for Complainant to be transferred from Ruth's supervision to NMC&A.[27] Complainant subsequently expressed his gratitude to Clements for the transfer.[28] Nevertheless, Complainant protests at paragraph 18 of his complaint that Clements' response to his physician's letter caused him to be the subject of disparate treatment because Clements did not forward the physician's letter to "the MMS Medical Division."

Complainant testified by deposition that he did not place any blame on Clements for not forwarding the physician's letter to his medical file.[29] He identified a Dr. Conrad or "the powers that be" in management as the person or persons responsible for failing to place the letter with his medical records.[30] Complainant himself subsequently provided a copy to Energy System's medical office.[31]

Respondents' not placing the letter in the Complainant's medical file does not constitute an adverse action. Clements testified that he "did not think to send the letter to Medical because the matter had been resolved satisfactorily to Complainant and in accordance with his doctor's request, that is, it requested that a specific action be taken and it was."[32] Clement's explanation of why he did not place the letter with the Complainant's medical records is accepted. The purpose of the letter was not to provide medical advice or treatment, but to offer a recommendation on assisting Complainant in avoiding stress. Moreover, there is nothing in the record to show that anyone other than Clements had any responsibility for assuming custody or control over the physician's letter. It is therefore determined that not placing Complainant's physician's letter with his medical records was not an adverse action under the ERA.

Complainant's transfer from Ruth's supervision to NMC&A resulted in his work site separation from Joey Roop, a fellow employee who Complainant characterizes as a good friend and "mentee." Complainant alleges that this separation from Roop was an adverse action in

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[26] Appendix to Respondents' brief at pp. 100808.

[27] Affidavit of Clements, ¶¶ 4-9.

[28] See letter dated May 26, 1994, Appendix to Respondents' brief at 27.

[29] Deposition of Complainant, *supra*, at 715.

[30] *Id.*

[31] Appendix to Respondents' brief at 165.

[32] Affidavit of Clements, ¶ 7.

retaliation for protected activity.[33] Complainant and Roop had been working together in Ruth's group since November, 1993. Both men worked three days per week for Ruth and, on a temporary basis, were working two days per week for NMC&A.[34] Ruth testified that upon the transfer of Complainant to NMC&A on a full time basis, he could not afford to have Roop continue his temporary assignment to NMC&A because NMC&A would then have a full time worker in Complainant and a part time worker in Roop instead of two part-time workers.[35] Complainant himself testified that part of the arrangement with the head of NMC&A to accommodate the Complainant's transfer was that NMC&A would have Complainant for five days a week instead of Complainant and Roop for two days each.[36]

Complainant's separation from his friend was not an adverse action under the ERA but was made to accommodate Complainant's request for transfer and for legitimate business reasons. Moreover, according to the affidavit of Clements, Complainant and Roop are now working for the same organization. "After [Complainant] completed his assignment at NMC&A in 1994, [he] returned to the Department of Training Development which had been moved to the Central Training Facility. Since Mr. Ruth no longer supervised that organization, neither [Complainant nor] Mr. Roop...reported to him any longer."[37]

Complainant also alleges generally that he has been subject to a hostile working environment.[38] However, in *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2, 92-CAA-5, 93-CAA-1 (Sec'y January 26, 1996), the Secretary emphasized that it was not enough to find that a hostile work environment existed. The requirements of the continuing violation must also be satisfied:

> Even though there is a nexus between the hostile work environment theory and the continuing violation doctrine, the ALJ was incorrect in finding that a showing of hostile work environment alone provided sufficient basis upon which to conclude that the continuing violation doctrine applied. (slip op. At 80; *see also West v. Philadelphia Electric Co.*, 45 F. 3d. 744 (3rd Cir. 1995).

As previously discussed, the continuing violation theory is applicable only if it is shown that at least one adverse action occurred within the statute of limitations period. As Complainant

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[33] Complaint, *supra*, ¶ 15.

[34] Affidavit of Ruth ¶ 5.

[35] Affidavit of Clifford A. Druitt, ¶ 5.

[36] Affidavit of Ruth, ¶ 8.

[37] Affidavit of Clements, ¶ 9.

[38] Complaint, *supra*, ¶ 71.

has not shown that he was the subject of an adverse action which occurred within the thirty day limitation period of the Environmental Acts or within the 180 day limitations period of the ERA, the continuing violations doctrine cannot be applied to toll the statute of limitations period.

Respondents motion for summary decision under 29 C.F.R. section 18.40(d) is granted as a review of the material facts of record shows that Complainant's complaint is barred by the statutes of limitations period.

RECOMMENDED ORDER

It is hereby recommended that the Respondents' Motion For Summary Decision be granted and Complainant 's complaint be dismissed.

At Washington, DC

Thomas M. Burke
Associate Chief Judge